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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-151

RIVER VILLA PARTNERSHIP, ET AL.
Petitioners

versus

SUN BELT FEDERAL BANK, F.S.B.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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November 5, 1990

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TABLE OF AUTHORITIES

REPLY TO BRIEF IN OPPOSITION

Pursuant to Rule 16.5, petitioners, River Villa Partnership, et al., file this reply to respondent's brief in opposition.

Several material misstatements of law and fact taint the Solicitor General's brief in opposition, viz:

FIRST. Like the courts below, the Solicitor General would have this Court ignore the gross unfairness of depriving River Villa of the benefit of this Court's holding in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), recognizing that a district court can adjudicate creditor claims against a failed thrift. It can hardly be said that River Villa was tardy in any aspect in its reliance upon *Coit*.

A. The Initial Counterclaim was Filed in the "Administrative Track" under Hudspeth.

Petitioners filed what amounted to a counterclaim with the Federal Home Loan Bank Board in July 1988, having been precluded from doing so in the trial court by the Fifth Circuit's decision in *North Mississippi Savings & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985). According to the Solicitor General, petitioners have argued that they relied on this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), in filing their counterclaim, but that is an inaccurate statement of the facts. The *administrative* counterclaim was filed long before *Coit* was finally decided and for that matter even before motions for rehearing were heard by the district court in the instant case. Petitioners relied on *Hudspeth*, as then in effect, in taking that action.

The appeal record reflects that, after the *Coit* decision was handed down reversing *Hudspeth* in March 1989 by this Court, petitioners immediately filed a request with the Court of Appeals under Rule 16(b) of the Federal Rules of Appellate Procedure, for an order permitting them to include in the record

on appeal the entire administrative "counterclaim" record as filed with the Federal Home Loan Bank Board pursuant to *Hudspeth*. The Fifth Circuit granted the motion, and entered an order accordingly on May 26, 1989. (See Appendix A). At that same time, the present pending counterclaim was filed with the district court.

That counterclaim was composed of the same allegations contained in the administrative proceeding before the Federal Home Loan Bank Board. Petitioners did not seek leave of court to file the second counterclaim. They were entitled to file it as a matter of right, after *Coit* eviscerated the administrative procedures promulgated by FSLIC and the Bank Board. As the Fifth Circuit itself has recognized, "While the finality of judgments is an important consideration, the goal of finality 'must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.'" *Federal Deposit Insurance Corp. v. Castle*, 781 F.2d 1101, 1104 (5th Cir. 1986) (citation omitted); see also *System Federation v. Wright*, 364 U.S. 642, 647 (1961) (effect of change in the law on district court's discretion).

The original counterclaim filed in July 1988 was asserted to protect against the running of the statute of limitations while the administrative appeal was pending before the Bank Board. The procedural spaghetti engendered by the Court of Appeals' application of *Hudspeth*, petitioners' compliance with *Hudspeth*, and the subsequent reversal of *Hudspeth* by *Coit* have been repeatedly employed by both FSLIC and now the Solicitor General to confuse and obfuscate this case. River Villa's partners should not be made to suffer for squarely turning the corners required by law prior to this Court's *Coit* ruling: "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street . . . ." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387-88 (Jackson, J., dissenting), quoted in *Heckler v. Community Health Services*, 467 U.S. 51, 61 n.13 (1984).

Although the Court of Appeals ignored it in reviewing the case, the administrative appeal existed, and the Court of Appeals permitted the record from that proceeding to be made part of the record before it. In fact, the Bank Board even issued a stay of execution of the district court's judgment during the pendency of the appeal below it. Only after *Coit* was rendered and the counterclaim filed in the district court was that stay lifted.

The Solicitor General's blindness on this procedural background presents a serious misrepresentation of the facts which forms the basis of one of the most obvious errors presented in the petition. Thus, a legal absurdity is being fostered that should not be tolerated by this Court. We remain the only case in the country that has been denied a remand, and while being the only one that properly followed the mandate of *Hudspeth*.

SECOND. The Solicitor General says (Brief in Opposition, p. 5) that the legal analysis below "is simply a straightforward application of *Langley* and *D'Oench, Duhme*." This is plainly a false conclusion of law, as we have shown in our petition for certiorari. Under *Langley v. FDIC*, 484 U.S. 86 (1987), petitioners have the right to show "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents" which "render[s] the instrument entirely void," 484 U.S. at 93. The courts below clearly erred in applying *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), to exclude evidence of fraud when the validity of the manner in which the powers of attorney on which the debt was created is the basic question at issue. This is not a case of secret side agreements. Here we have defects in notes and a mortgage shown on the face of the documents. *D'Oench, Duhme* has nothing to do with this case.

CONCLUSION

In the time that has elapsed since the filing of their petition for certiorari, several of River Villa's partners have been pushed into financial ruin; others are on the brink. Peremptory relief is vital, and we urge this Court to summarily reverse the judgment below, with directions that under *Langley* and *Coit* summary judgment for FSLIC was error. The case should be remanded to the district court, with an opportunity afforded petitioners to prove their allegations of fraud in the fact, which would render the underlying obligations entirely void.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3011

DR. HENRY MCLEMORE, II, ET AL.,
Plaintiffs,

versus

PAUL J. LANDRY, ET AL.,
Defendants.

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SUN BELT FEDERAL BANK, F.S.B.,
Plaintiffs-Appellees,

versus

RIVER VILLA PARTNERSHIP, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Louisiana

Before, GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee, FSLIC, Etc., to dismiss the appeal is DENIED.

IT IS FURTHER ORDERED that the motion of appellee, FSLIC, Etc., to dismiss non-designated appellants on grounds no defendant other than River Villa was specified in Notice of Appeal is DENIED.

IT IS FURTHER ORDERED that the motion of appellant to supplement the record on appeal is GRANTED, given the unusual circumstances of this trial and appeal.